STATE OF MICHIGAN

COURT OF APPEALS

GREGORY A. RAYMOND and ROWLAND R. RAYMOND,

Plaintiffs-Appellants,

v

DART OIL AND GAS CORPORATION d/b/a DART ENERGY CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 10, 2000

No. 211804
Clare Circuit Court
LC No. 96-900312-CK

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's orders granting summary disposition to defendant pursuant to MCR 2.116(C)(7) and (8) and denying their motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arises from defendant's failure to pay plaintiffs royalties under their oil and gas leases. Plaintiffs alleged that as a precondition to receiving payment of their royalties, defendant's agent required them to sign division orders that were inconsistent with the terms of the leases.[1] Plaintiffs refused to sign the division orders and defendant's agent rejected plaintiffs' proposed form of division orders. As a result, plaintiffs did not execute the division orders, defendant did not release the royalties and plaintiffs filed the present suit against defendant. Plaintiffs' amended complaint included counts for breach of contract, intentional infliction of emotional distress and exemplary damages. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8) for the intentional infliction of emotional distress and exemplary damage counts. Then, defendant paid plaintiffs the royalties, which totaled $279.74,[2] and moved for summary disposition of the breach of contract count under MCR 2.116(C)(7). Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10) and (I)(2), claiming that defendant admitted liability as evidenced by its payment of the royalties. The trial court granted defendant's motion for summary disposition, denied plaintiff's motion, and ordered defendant to pay interest "on that amount [of royalties] held in suspense between the date of filing of the complaint, June 24, 1996, and the January 28, 1998 payment of royalties."

In their first issue on appeal, plaintiffs contend that the trial court erred in granting defendant's motion for summary disposition with respect to their claim for intentional infliction of emotional distress. A grant or denial of summary disposition based upon a failure to state a claim on which relief can be granted is reviewed de novo by this Court. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). Summary disposition may be granted under MCR 2.116(C)(8) when the opposing party has failed to state a claim on which relief can be granted. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claim based on the pleadings alone, accepting as true all well-pleaded factual allegations and construing those allegations in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(8) should be granted only when the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*.

The necessary elements of a claim for intentional infliction of emotional distress are (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Teadt v Lutheran Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). Liability under this theory has been found "only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* Here, plaintiffs alleged that defendant "engaged in extreme and outrageous conduct on several occasions by refusing to accept the form of Division Orders provided by the Plaintiffs, as the Division Orders submitted by the Defendants . . . went beyond that required in the controlling oil and gas leases." Specifically, plaintiffs alleged that defendant refused to accept certain division orders, refused to pay plaintiffs' royalties without division orders as requested by plaintiffs' counsel, and refused to accept division orders that contained "only the Plaintiffs' specific interest in production" that were "redacted to comply with the express provision of the Plaintiffs' oil and gas lease." Plaintiffs further alleged that defendant, by refusing to accept the form of division order submitted by plaintiffs, "purposely intended not to pay plaintiffs their suspended royalty."

We agree with the trial court's determination that plaintiffs failed to state a claim for intentional infliction of emotional distress. Plaintiffs' have alleged nothing more than a commercial dispute involving defendant's failure to pay the royalties because the parties could not reach an agreement on the form of the division orders. The failure to pay a contractual obligation, without more, does not constitute the extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress, even if the failure is wilful or in bad faith. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 606; 374 NW2d 905 (1985); *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 657; 517 NW2d 864 (1994). Defendant's alleged actions do not constitute the extreme and outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Accordingly, we affirm the trial court's order dismissing plaintiffs' claim for intentional infliction of emotional distress count.

Next, plaintiffs contend that the trial court erred in dismissing their count for exemplary damages pursuant to MCR 2.116(C)(8). Plaintiffs' alleged that defendant's refusal to accept plaintiffs' form of division order and to pay plaintiffs their suspended royalties was "malicious, ill-willed, and done in bad-

faith" and that as a result plaintiffs have endured indignation and mental suffering. As a general rule, exemplary damages are not awarded in cases involving only a breach of contract. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419-420, 295 NW2d 50 (1980). "[A]bsent allegation and proof of tortious conduct existing independent of the breach, . . . exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract." *Id.* at 420-421. We conclude that the rule announced in *Kewin* applies to oil and gas leases. In *J J Fagan & Co v Burns*, 247 Mich 674, 678; 226 NW 653 (1929), our Supreme Court characterized the modern oil and gas lease as "a technical contract, reflecting the development and present status of the law of oil and gas."[3] Furthermore, an oil and gas lease is a commercial undertaking. The purpose of leases of land for exploration and development of oil and gas wells is to explore the land and produce oil and gas, provided that they may be found in paying quantities. See *Compton v Fisher-McCall, Inc*, 298 Mich 648, 653; 299 NW 750 (1941). Because *Kewin* applies here, exemplary damages may not be awarded to plaintiffs unless they alleged tortious conduct separate and distinct from their breach of contract claim. Here, we cannot conclude that defendant's alleged conduct, i.e., its refusal to accept plaintiffs' form of division order or pay the royalties, was tortious conduct independent of the alleged breach of contract. Accordingly, we hold that the trial court properly dismissed plaintiffs' count for exemplary damages.

Next, plaintiffs contend that the trial court erred when it granted defendant's motion for summary disposition of its breach of contract count pursuant to MCR 2.116(C)(7). We decline to address this issue as moot. "An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief." *Mich Nat Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997). Plaintiffs' breach of contract claim sought payment of the royalties with interest. It is undisputed that defendant paid plaintiff the royalties and that the trial court ordered defendant to pay interest on the royalties from the date plaintiffs' filed their complaint until the payment of the royalties. Because plaintiffs received the damages they sought, this Court can offer no further relief to plaintiffs. Likewise, we decline to address as moot plaintiffs' final contention that the trial court erred in denying their motion for summary disposition on the breach of contract count pursuant to MCR 2.116(C)(10) and (I)(2).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski
/s/ Jeffrey G. Collins

[1] Division orders govern the distribution of oil and gas proceeds. *Condra v Quinoco Petroleum, Inc*, 954 SW2d 68, 70 (Tex Civ App 1997).

> A division order is "[a] contract of sale to the purchaser of oil or gas. The order directs the purchaser to make payment for the value of the products taken in the proportions set out in the division order." Williams & Meyers, Manual of Oil and Gas

Terms § 258 (1985). [*Anadarko Petroleum Co v Venable*, 312 Ark 330, 338; 850 SW2d 302 (1993).]

The purpose of the division order is to assure that the purchaser pays only those parties who are entitled to payment. *Blausey v Stein*, 61 Ohio St 2d 264, 267; 400 NE2d 408 (1980). "By signing the division order, the lessor is simply verifying that he has a right to royalty payments." *Id.*

[2] It appears from the record that these royalties were held in a separate account pending the resolution of a quiet title action involving the leased real estate.

[3] In *J J Fagan*, *supra* at 677-678, our Supreme Court reviewed a clause from an early version of the "Producers 88" lease form. Here, plaintiffs executed a 1987 revision of the Producers 88.